



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Richard Doyle,
City Attorney

SUBJECT: Electronic Cigarette
Regulation

DATE: April 10, 2014

RECOMMENDATION

Direct staff to examine the public health, safety, and welfare issues surrounding the regulation of electronic cigarettes.

BACKGROUND

The Rules Committee on April 2, 2014, directed the City Attorney's Office to review the local, state and federal regulation of electronic cigarettes ("e-cigarettes").

ANALYSIS

Federal Regulation.

In 2008, the FDA moved to establish authority over e-cigarettes as drugs or drug delivery devices by blocking the import of new e-cigarette shipments into the United States. The FDA claimed it had the authority to regulate e-cigarettes as "drugs," "devices," or drug/device combinations under the Food, Drug and Cosmetic Act. In 2009, the e-cigarette manufacturer Sottera sued the FDA. Sottera argued the agency didn't have authority over e-cigarettes as drugs or drug delivery devices, and therefore could not stop shipments. In January 2010, the district court agreed with Sottera and held that the FDA may not regulate e-cigarettes as a drug or drug delivery device. Instead, because the nicotine contained in the e-cigarette cartridges is derived from tobacco, the court held that the FDA may regulate them as a tobacco product. The FDA appealed to the Court of Appeals. The Court of Appeals upheld the lower court's decision on December 7, 2010. It held that because the e-cigarettes at issue are not marketed as tobacco cessation aids (such as nicotine gum or patches), the FDA does not have authority over e-cigarettes as a drug or drug delivery device.

The FDA decided not to appeal the Court of Appeals' decision to the U.S. Supreme Court, instead announcing in April 2011 that it plans to issue regulations on e-cigarettes as a tobacco product under the Tobacco Control Act. Thus far, these proposed regulations have not been issued. Only e-cigarettes that are marketed as tobacco cessation aids are currently regulated by the FDA.

State and Local Regulation

The Tobacco Control Act expressly allows state and local governments to regulate the sale or use of tobacco products, and authorizes them to enact measures that are more restrictive than federal law. The State of California prohibited the sale of e-cigarettes to minors in September 2010, but does not currently restrict the use of e-cigarettes in any way.

The San José Municipal Code currently prohibits smoking in various locations, but it does not regulate the use of e-cigarettes. The Municipal Code could be amended to prohibit the use of e-cigarettes in all of the locations where the City currently regulates smoking. However, the City Attorney's Office recommends that any proposed ordinance regulating the use of e-cigarettes include comprehensive findings regarding the public health, safety, and welfare purpose of the ordinance. In order to make findings of this nature, the appropriate City staff would need to thoroughly examine and bring forward all relevant public health, safety, and welfare information related to e-cigarettes and the proposed regulation of them. In the event of a legal challenge, these findings would aid the City in its defense of the regulation of e-cigarettes.

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City Attorney

By: 
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Deputy City Attorney